(3)

BEFORE THE HIGH COURT OF JUDICATURE AT JABALPUR.

CRIMINAL APPEAL NO. 2361 /2000

9690

Filed on 11/5/2000
by Shri Manish
Advocate
D.A.2.

APPELLANT (IN JAIL) ... NARMADA PRASAD
S/o. RAM SUNDER GUPTA
AGED 35 YEARS OCCUPATION : LABOUR
R/o. MAHOURAPARA (HEAR ARAB BABA)
MANENDRAGARH DISTT. KORIYA (M.P.)

VERSUS

RESPONDENT ... STATE OF M.P.
THROUGH POLICE STATION MANENDRAGARH
DISTT. KORIYA.

CRIMINAL APPEAL U/s. 374(2) OF THE CRIMINAL PROCEDURE CODE.

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR (C.G)

CRIMINAL APPEAL No. 2301 of 2000

Narmada Prasad

-v-

State of M.P.

JUDGMENT

(15-03-2001)

The appellant being aggrieved by the judgment dated 24-08-2000 passed in Special Case No.103 of 1998 by the learned Special Judge (NDPS Act), Sarguja (M.P) convicting the appellant for the offence punishable under section 20(b)(i) of the Narcotics Drugs and Psychotropic Substances Act 1985 and sentencing him to undergo R.I. for two years and pay fine of Rs.1000/-, in default of payment of fine, to undergo six months further R.I., has filed this appeal.

(2) The prosecution case in brief is that Jagdish Singh Bhadoriya (P.W.6) was posted at Police Station Manendragarh on receiving the information on 15-5-1998 that some body was coming with contraband 'Ganja', went to the spot with Head Constable 941 Ganpat Pandey and Constable No.899 Suresh Kumar to Fabbara Chowk. At about 5.45 on coming the accused was seen and after the informer raised his fingers towards the accused, the accused was apprehended, a notice under section 50 of Narcotic Drugs and Psychotropic Substances Act 1985 was given to him and after

seeking the consent of the accused to be searched by P.W.6 Jagdish Singh Bhadoriya, a search was conducted in which about 400 grams of Ganja was recovered from the possession of the accused. The said Ganja was weighed on the spot, two samples were drawn from the contraband and were properly sealed. The accused was brought to the Police Station where the First Information Report was recorded, the contraband and samples were given to Police Station Moharrir for being kept in safe custody. The samples were sent for their chemical analysis. On completion of investigation, a challan in accordance with law, was submitted by the Police agency against the accused in the competent Court.

(3) After recording the evidence and hearing the parties, the learned trial Court convicted the accused and sentenced him accordingly.

(4) Shri Raj Kamal Singh, learned counsel for the appellant submits that the prosecution evidence is shaky-ing, the Court below was not justified in relying upon the statements of said Bhadoriya (PW.6) and in absence of the evidence that the narcotics and samples were sealed and that the concerned Police Officer had recorded the information and sent the same immediately to the officer immediate superior to him and as there are violations of the mandatory provisions of the NDPS Act, the appellant deserves to be acquitted. On the other hand, learned counsel for the State submits that the Court below was not unjustified in relying upon the statement of P.W. 6 Bhadoriya who has been supported by the other witnesses.

(5) Section 42 of the NDPS Act reads as under:-

42. Power of entry, search, seizure and arrest without warrant or authorisation--(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of Central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or Constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building conveyance or enclosed place may, between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other articles which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance;

Provided that if such officer has reason to believe that a search-warrant or aut.orisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recordin the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section(1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy therefor to his immediate official superior.

According to section 42, when an empowered officer receives any information given by any person, then such information is to be taken down in writing, but if such empowered officer nurses a belief from his personal knowledge that some body is possessed of the narcotics or contraband, then he is not required to record the reasons of his belief. Proviso to sub-section (1) of section 42 says that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, the search officer may enter and seach such building conveyance, or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. Form a perusal/sec of

42 of the NDPS Act, it would clearly appear that an empowered officer is not required to record the reasons of his belief to search or effect seizure and arrest, but if he receives an information, then, under the Act he is obliged to record that information and send the same to his immediate superior officer. If such empowered officer wants to make an entry or search or wants to effect the seizure or arrest a person without warrant or authorisation between sunset and sunrise, then in such a case, even if he has personal knowledge or nurses a personal belief, then too, he is required to record the grounds of his belief. According to sub-section (2) of Section 41 where an officer takes down any information in writing as provided under sub-section (1) or records grounds of his belief under the proviso thereto, he is obliged to send a copy, therefor, to his immediate officiab superior. In simple words, it can be said that when the information is received and is taken in writing, then, the officer is obliged to send a copy of the recorded information to his immediate official superior. The question whether non-compliance of the provisions of Section 42 (1) would vitiate the trial or not, came up for consideration before Their Lordships of the Supreme Court. In the matter of State of Punjab -v- Balvir Singh, AIR 1994, Supreme Court, Pg.2378. Their Lordships in the matter of Balvir Singh (supra) observed that "u/s 42(1), the empowered officer, if has a prior

information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that the offence under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out search or arrest without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of his belief, but under the proviso to section 42(1) , if such officer has to carry out such search between sunrise and sunset, he must record the grounds of his belief. To this extent, these provisions are mandatory and contravention of the same would effect the prosecution case and vitiate the trial". The observations made in the matter of Balvir Singh (supra) were quoted with approval by a still larger Bench of the Supreme Court in the matter of State of Punjab -v- Baldev Singh, AIR 1999 S.C. 2378. Their Lordships while quoting the earlier observations with approval , observed that non-compliance with the mandatory provisions would vitiate the trial. The matter again came up for consideration before the Supreme Court in the matter of Abdul Rashid Ibrahim Mansuri -v- State of Gujarat AIR 2000 S.C. 821. In the said matter, the concerned Police Officer admitted that he proceeded to the spot only on getting information that somebody was trying to transport the narcotic substance. When the officer was asked in cross-examination whether he had taken down the information in writing, he had answered in negative. The said officer did not apprise his superior officer of any such information either then, or later much less sending a copy of the information to the superior officer. With these facts available on the record, Their Lordships of the Superme

Court observed that there was absolute non-compliance of the mandatory provisions contained in Section 42(1) of the NDPS Act. The accused in the said case was acquitted by the Supreme Court. In the matter of Ahmad -v- State of Gujarat AIR 2000, S.C. 2790, the Supreme Court while appreciating the provisions of Sections 42 and 50 of the NDPS Act again observed that compliance with the said provisions is mandatory and non-compliance would vitiate the trial.

(06) Now I come back to the facts of the case. In the present case, P.W.6 Jagdish Singh Bhadoriya stated that on 15-5-1998, he received an information that Narmada Prasad Gupta was coming with narcotic substance. After receiving the information, he along with his staff went to Fabbara chowk. After receiving further information about the identity of the accused the accused was apprehended, he was given a notice u/s 50 and after obtaining his consent, the search was made and seizure was effected. In his examination-in-chief, he has no where stated that after receiving the information from the informer, he recorded it in writing and in accordance with the mandatory provisions as contained in section 42(2) he sent the copy of the recorded information to his immediate official superior. In Cross-examination(para-16,) he admitted that he did not mention anything in the FIR about the information which he received from the informer. He however, submitted that he referred the said subject in his Rosnamcha Sanha. Unfortunately, the said rosnamcha sanha was not produced in the Court. During the course of trial, the prosecution filed as many as 12 documents. Ex.P-1 is an information sent by the concerned police officer to the SDO(P). The informa-

tion said that from the reliable information, the Police officer learnt that Narmada Prasad, s/o Ramsunder Gupta, was possessing Ganja in a bag. The said person was apprehended by the police, therefore, the SDO(P) should come to the spot, take search and make seizure. This information to the SDO(P), in any case, cannot be said to be an information recorded in writing in accordance with the provisions of Section 42(1) of NDPS Act. This information, in fact, informs the SDO(P) that the accused was already apprehended. Annexure P-1 (appears to have been marked double) is the arrest memo. Ex.P-2 is the seizure memo. Ex.P-3 is the information given to the relations of the accused regarding arrest of the accused. Ex.P-4, P-5, and P-6 are the seizure chits. Ex.P-7 is the letter given to the Moharrir of Police Station, Manendragarh, requiring him to keep the contrabands in safe custody. Ex.P-8 is the notice issued to the accused u/s 50 of the NDPS Act. Ex.P-9 is the First Information Report while Ex.P-10 is the copy of the request letter which was sent to the Director, Forensic Science Laboratory, alongwith the samples. Ex.P-11 is the copy of the seal with which the contraband was sealed. Ex.P-12 is the information sent to the Superintendent of Police Sarguja and Addl. Superintendent of Police etc., regarding registration of offence. The prosecution witness (P.W.6) J.S.Bhadoriya does not say that immediately after receiving information he recorded it in writing and in accordance with sub-section (2) of Section 42, he sent a copy of the recorded information to his immediate official superior. No document has been filed during the course of the trial to show that the

said information was recorded in writing or was sent by P.W.6 Bhadoriya to the immediate official superior.

(7) From the records, it clearly appears that the provisions rather mandatory provisions contained in section 42(1) and 42(2) of the NDPS Act were not complied with. The result, in accordance with the judgment of the Supreme Court, has to be in favour of the accused. The learned trial Court did not try to appreciate that if the mandatory provisions are not complied with, then, the non-compliance of the mandatory provisions would vitiate the trial and the accused is not required to show that he suffered any prejudice because of non-recording of the information, non-submission of the same to the immediate official superior and non-filing of the same in the Court. When the law requires that something is to be done in accordance with law, then, it has to be done in that manner only and not at all. In the present case, because of non-compliance of the mandatory provisions, the accused could not be convicted.

(8) The findings recorded by the Court below are set aside. The conviction and the sentence are also set aside. The accused is acquitted of the charges. He be set at liberty, if not required in any other case. In the result, the appeal is allowed.

Sd/-
R.S. Garg
Judge

/Rao/